IN THE

Supreme Court of the United States

October Term, 1962

No. 227

DAVID WASSERMANN,

Petitioner,

against

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

It is fitting and proper to petition this Honorable Court for protection against a conviction by a tribunal, created by the accusers, wherein the accusers preside as judge and jury; at which hearing the accuser is the prosecutor in a proceeding where probative facts are not established and *ex post facto* law, enunciated by the accusers, asserted as constituting legal sufficiency for sustaining charges on the basis of suspicion and hearsay comments. *Consolidated Edison* v. *N.L.R.B.*, 305 U. S. 197, 229-230, 59 S. Ct. 206, 217:

> "* * * But the assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence." (pp. 229-230 of 305 U. S.; p. 217 of 59 S. Ct.)

See also *Cosmopolitan* v. *Feuchtwanger*, 226 N. Y. S. 2d 584, 592 (Pet., Point V, p. 29):

> "When the constitution requires a hearing, it requires a fair one, one before a tribunal which meets

at least currently prevailing standards of impartiality."

Sung v. *McGrath*, 339 U. S. 33, 50, 70 S. Ct. 445, 454.

See also, *Hilfer* v. *Board of Regents*, 283 N. Y. 304, 307-309.

It is not absurd to plead to this Court, to inquire into the unrestrained power of a lay tribunal to create a forum, in an atmosphere of hysteria, when the professional lives of some 1,500 doctors [1] in one city, New York, are in jeopardy on the basis of *ex post facto* law, suspicion and hearsay evidence. *Gardner* v. *Ginther*, 250 N. Y. S. 176, 182, 232 A. D. 296, aff'd 257 N. Y. 578, per cur.

Respondent cites an 1856 [2] decision in support of its procedure and alleges that custom justifies this action. Such argument is entitled to the same respect as a statement that it was the custom, about that time, to burn women at the stake on the basis of accusation of witchcraft. See *Gardner* v. *Ginther, supra.*

Respondent cites the *Barsky* case [3] wherein a convicted criminal had his license to practice medicine suspended. This hardly justifies the exercise of dictatorial power enabling accusers to legislate, after the event, and to place in jeopardy of destruction, years of study and public service of professional men.

Perhaps the time has arrived to review the entire holding in the *Barsky* case, *supra.* See also *Cherry* v. *Board of Regents*, 289 N. Y. 148 at page 154, opinion by Judge Lehman.

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[1] See Appendix to Petition, page 61a, contemporary newspaper articles (photostats), New York Journal American, Saturday, January 13, 1962.

[2] *Ex Parte Secombe*, 19 How. 914.

[3] *Barsky* v. *Board of Regents*, 347 U. S. 442, 74 S. Ct. 650.

See the dissenting opinion by Mr. Justice Black concurred in by Justices Frankfurter and Douglas.[4]

The other citations by respondent seem to justify the slang expression "respondent is out in left field."

These cases treat with lay people: (a) practicing a profession without a license (b) conduct by private companies; absolutely nothing to do with a licensed practicing doctor.

When penal measures are imposed on the basis of *ex post facto* law, it is not absurd to complain that constitutional rights have been violated. *Cummings* v. *The State of Missouri*, 71 U. S. 277; *In re Donegan*, 282 N. Y. 285; *Gardner* v. *Ginther*, *supra*.

The privilege of inquiry into hearsay matters, does not constitute a license for a conviction without proof and the use of a false exhibit[5] is bad enough in itself.

The use of this exhibit was clearly in violation of law. *Mooney* v. *Holohan*, 294 U. S. 103, 112, 55 S. Ct. 340, 341, 342; *U. S.* v. *Zimmerman*, 94 F. S. 22, 25; *Lloyd, etc.* v. *Elting*, 287 U. S. 329, 339-340, 53 S. Ct. 167, 172.

The committee which found petitioner guilty was improperly constituted.

Factually, it was constituted in violation of law as laid down in the case of *Hilfer* v. *Board of Regents*, *supra*.

If one ground of conviction is invalid on constitutional grounds, the judgment cannot be sustained. *Williams* v. *N. Carolina*, 317 U. S. 287, 292, 63 S. Ct. 207, 210; *Stromberg* v. *California*, 282 U. S. 339, 368, 51 S. Ct. 532, 535.

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[4] *Barsky* v. *Board of Regents*, *supra*, at 347 U. S. pages 459, 461.

[5] See letter of Attorney General of the State of New York, dated February 10, 1961, addressed to Honorable Francis Bergan, Presiding Justice of the Appellate Division, 3rd Dept., set forth in the footnote of page 5 of the petition.

This matter is of grave importance not only to petitioner, but to all professional people whose licenses may be in jeopardy upon the basis of an *ex post facto* law applied in a forum not only friendly to the accusers, but which forum itself is also the prosecutor, judge and jury, and without restraint by rules of evidence which obtain in a Court of law. When to all of this is added the use of a false exhibit—an exhibit withdrawn from a lower Court upon the plea that its use was error, but which exhibit is presented in argument to the Appellate Court, the procedure is not only unlawful, but immoral.

A matter such as this is of substantial public concern and the procedures used by the State of New York in this case should be reviewed by this Court.

Respectfully submitted,

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Attorney for Petitioner.